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No. 03-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,

Petitioners,

v.

JAMES J. McDONALD, JR., EMPLOYEE RELATIONS LAW JOURNAL EDITORIAL BOARD, EMPLOYEE RELATIONS LAW JOURNAL, FISHER AND PHILLIPS, L.P., and ASPEN PUBLISHERS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As we urge in a separate and therein state suit-based Petition for Certiorari, concerning a different and there state-based suit, Plaintiff-Appellant-Petitioners respectfully observe that where medical diagnoses and putative self-characterizations as recorded in federal court decisions are misreported by legal professionals in revisionist fashion — that First Amendment freedom of expression and the press should not and rightly do not provide protections from suit to set the record straight or either find equitable remedies or damages, the prohibition of which thus curtails the right to speak and petition in one's own voice and reach a jury on the matters. This one issue has many dimensions. But besides this, the nature and types of multiple issues raised by the courts' conclusions in theses matter compel multiple questions.

1. Whether the outcome of this case which provides the Defendants with First Amendment defenses is consistent with Petitioners' own First Amendment rights to free speech and expression, and the right to petition the government for grievances?

2. Whether where constitutional issues and outcomes abound, serial libel should be excused because publication of similar but not the same falsities in different contexts of publication can lead to material confusions in case law even if that is what defendants in libel maliciously intend.

3. Under the First Amendment to the Constitution or other law and policy, should the courts let stand the

granting of privilege against jury deliberation a legal reporter's and publishers' knowing mischaracterization of a prior federal verified physical disability suit filed in the 1980's context under the Rehabilitation Act as if a later and malfeasant federal mental disability suit under the Americans with Disabilities Act filed in the 1990's ?

4. Under the First Amendment to the Constitution or other law and policy, is reporting that a person with a disability characterizes him or herself as mentally disabled and a court so found a parody in the marketplace of ideas, and if so on what grounds[1]?

5. Under the holdings of the Supreme court or other law and policy, does jurisdiction over the author as well as the publishers in this case hold through purposeful availments of the forum directly and in agency relations as set forth in holdings of the U. S. Supreme Court, and with the evidence submitted should a hearing have been held upon this signal concern?

6. Under federal as well as state statutes which should respect the relevant federal law, Is anti-discrimination law in broad and are specific federal and state statutes violated where the individual circumstances and diagnoses of persons with disabilities are overridden, discarded, or censured?

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[1] Under the law and otherwise, in any event, private persons with disabilities are not political figures to be lampooned and mocked and certainly not based on their disabilities. A court's suggestion of equal access to media is something which Petitioners highlight for high court review

7. .Does the federal appeal court unconstitutionally or otherwise improperly relinquish jurisdiction over its district court on the basis of preclusion where (a) the full and fair litigation claimed was also before an answer or discovery; and (b) the state intermediate court decision referenced, and also at said early stage of proceedings, at defendants' behest decided only one ostensibly matching issue among the several plead, and this one issue concerned a preceding publication with different content, tone, contexts, and list of defendants?

8. Should juries or judges properly decide if published mis-characterizations of disabilities are serious or is it lawful and acceptable for a court to decide the sole remedy for libel based on disabilities is to write an article for submission to the marketplace of ideas?.

9. Are substantive and procedural safeguards for the equal protection of persons with disabilities short-circuited where the court which should be guided by the Federal Rules of Civil Procedure and the relevant substantive law of the state:

(a) miscasts a citizens defamation suit as a disappointed employee suit; as if all civil rights were curtailed when telecommuting was denied;

(b) Assigns the selfsame same Master as himself participated in the prior dismissal of employment suit here referenced.

(c) (However meant as to tone, the court

swerved to employment law and not defamation law in recommending writing a n article. Was the District Court correct in deciding the sole remedy for mischaracterizing disabilities us writing an article, or is the matter in fact justiciable? Not solacing.) takes it out of the right to petition.

(d) Provides five says for commencement and completion of discovery (the former suit discovery took years);

(e) Dismisses the case preemptively before the summons and complaint could be served, then again upon an order never issued to produce a proof of service, a third time before defendant answers or discovery commences, such there was no joinder judgment or evidence for a jury to deliberate upon and only defendants could wage motion practice;

(f) refuses a hearing on the matter of personal jurisdiction over the one key defendant;

(g) Avoids mention or application of defamation law including prohibition of looking at only one part of a text out of context;

(h) refuses to consider all the issues plead and instead fashions one at defendants request in order to bridge to a different case and find issue preclusion

(i) Provides defendants with a first amendment defense although they do not raise one;

(j) Provides no analysis to support the first amendment grant.

(k) In further manner also short circuit due process and the [phases of litigation prescribed in the federal rules of civil procedure.

(l) Ignores defamation substantive law of defamation and the power of the Internet or other electronic channels to replicate misinformation, as demonstrated of Record.

(m) Ignores procedural law like an undeveloped case before answer or discovery. But Publishers long decision with bad facts from employment giving appearance of phrases in litigation progressing with satisfaction.

(n) Holds that a person with disabilities libeled as to those disabilities has the sole remedy of writing an article about employment litigation.

(o) Advises settlement talks of a Friday Afternoon and Publishes his Decision Monday Morning.

(p) Acknowledges republication of admitted medical falsities on the Internet where misinformation spreads rapidly, and declines to exercise injunctive powers upon presentation of precedent for reasons of "prior restraint" of false accusations?

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misinformation spreads rapidly, and declines to exercise injunctive powers upon presentation of precedent for reasons of "prior restraint" of false accusations?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Linda D. Misek-Falkoff and Adin Falkoff respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit and the Southern District Court Memorandum and Order in this case, in order to .preserve for all citizens and persons with disabilities included the rights of free speech and free expression and the right to petition the government in our own voices, and to enjoy the protections of substantive and due process and the protections of anti-discrimination law and social values on an equal footing with others, to support ward the protection of the rights and dignity of persons with disabilities. Whatever their type and origin.

With especial focus, we ask the Supreme Court to provide that settled case law concerning individuals with disabilities not be misreported and miscast in legal reports, commentaries, or other contexts, and especially in today's dawning of swift and pragmatically untraceable electronic transmission of "portable" data on computer systems such as the (at present) Internet, here medical in nature, and the universally recognized need for accuracy in such recordations.

OPINIONS AND ORDERS BELOW

The Summary Order of United States Court of Appeals, Second Circuit is cited at 63 Fed.Appx. 551 (Docket No. 02-7091, Kearse, Cabranes, and Straub, Circuit Judges, April 24, 2003), and appears at Pet. App. A.

The Memorandum and Order of United States District Court, S.D. New York is cited at 177 F.Supp.2d 224 (No. 01 CIV 0816 (per Brieant, C.J.), Nov. 19, 2001), and appears at Pet. App. B.

The Second Circuit denial of Rehearing is unpublished and appears at Pet. App. C.

STATEMENT OF JURISDICTION

The Southern District of New York Memorandum and Order (App.) was entered November 11, 2001.

The judgment of the Court of Appeals (Pet App. B) was entered on April 24, 2003.

Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied November 10, 2003; a Mandate to this effect was issued December 29, 2003.

Petitioners invoke the Court's jurisdiction under 28 USC. Sec 1254(1).

PROVISIONS OF LAW

[At App Pet A.]

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[2] (Goldwater v. Ginzburg, 414 F.2d 324, 338 (2d Cir. 1969) citing, Bishop v. New York Times Co., 233 N.Y. 446, 135 N.E. 845 (1922); Brunstein v. Almansi, 71 N.Y.S.2d 802 (Sup.Ct. Nassau Co. 1947)).[2] f McDonald's own attorney Kenneth Norwick in this own writings (The Record] instructs that accusations of mental unsoundness are subject to libel *per se* suits.

[3] See, Celle v. Filipino Reporter Enterprises, 209 F.3d 163, 171 (2d Cir. 2000) quoting Herbert v. Lando, 441 U.S. 153, 203 (1979).

HEADNOTES:

"A false accusation of insanity, mental imbalance, or mental disease, is libelous per se under New York law."[4]

"States undeniably have an interest in affording individuals some measure of protection from unwarranted defamatory attacks. Libel actions serve that end, not only by assuring a forum in which reputations can be publicly vindicated and dignitary injuries compensated, but also by creating incentives for the press to exercise considered judgment before publishing material that compromises personal integrity . . . The law of libel seeks to protect various individual interests against injury resulting from false and defamatory communication. It runs squarely into the right to freedom of expression".[5]

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[4] *Goldwater v. Ginzburg*, 414 F.2d 324, 338 (2d Cir. 1969). And see Norwick, Kenneth, one of Defendant-Respondents' attorneys, who in The Rights of Authors, Artists, and other Creative People**Error! Bookmark not defined.** describes in this ACLU Book "Red Flag" 'words and expressions' ... that may lead to a libel lawsuit if not carefully handled by writers: including "mental disease." or "Any words or expressions imputing a "loathsome disease ... crime .. lying ... unprofessional ... unsound mind."

[5] *Celle v. Filipino Reporter Enterprises*, 209 F.3d 163, 171 (2d Cir. 2000) quoting *Herbert v. Lando*, 441 U.S. 153, 203 (1979).

INTRODUCTION AND BACKGROUND

A. The unconstitutional derision of individuals with disabilities under First Amendment premises is the sting in this suit.

This present case, based on Respondent's article "The Americans with Difficult Personalties Act," and where the District Court wrote:

> This discussion of a reported decision of the late Judge Broderick of this Court, is not so removed from the facts as to lose its First Amendment protection as a fair report of a public judicial proceeding. Dr. Misek-Falkoff's litigation is but one of many which the author decries.
>
> The Court understands that Plaintiffs view the article somewhat differently; that at least from their position the employee suffered severe *physical* pain of neurological origin, and was not a "mental case" or a person suffering a psychiatric disorder. The article characterizes Plaintiff as having presented a legally unworthy claim, and with being disgruntled, rude and insubordinate and mischaracterizes her claim of a physical problem as a mental one.
>
> Dr. Misek-Falkoff's criticism of the article is not totally lacking in validity. Her sole remedy is to write an article of her own, in order that the different views of the condition of employment litigation may be resolved in the intellectual marketplace as a result of public discussion, expected to be "robust" and fully protected as to all participants by the First Amendment. The Court does not perceive any significant stigmatizing effect of the article as claimed by Plaintiffs, but in any event the article is privileged as fair comment on a matter of public interest and for that

> reason cannot be the subject of a valid defamation claim.

may be a case of first impression in First Amendment jurisprudence, where a text bristling with retaliation against persons with disabilities who follow lawful paths to relief from them by way of federal Statutes and Acts derision and false report turn a federal case on its head, virtually reverse its findings, make a mockery of genuine and severe physical conditions, but the author and publishers are awarded "free speech" protections and Petitioner sent outside the court to find her own remedies.

Petitioners brought no Americans with Disabilities Act case and no "mental case" and did not take away from the rights of others to do so. They were parties in a Rehabilitation Act case[6] in the past, filed (by counsel) before the ADA was even enacted, and based on the physical disability of severe pain as acknowledged by a prior federal court whom Respondents here misreport.

For all the aspects of levity in the district court's seemingly bemused decision for the press, this is a serious case which tests the limits of the First Amendment defense and calls into question just how wide the zone of danger really is when persons with disabilities file valid suits, through their own freedom of speech (acts) and right to petition by filing of suit, and whether mockery will always follow the pursuit of civil liberties. This might be politically permissible, though usably directed to public persons, but in legal settings must not the platform be otherwise. In terms of disability discrimination, the Supreme Court can assess if Mr. McDonald and the courts here claiming justification in the constitution have just too far. The courts to which we look for balancing values, and here freedom of

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[6] *Misek-Falkoff et al v. IBM*, 854 F. Supp. 215 (S.D.N.Y) filed 1989 decided 1994.

the press and right to reputation, have in this instance impelled us to the highest court to seek some clarity and some repose.

This court has time and again (as in *Sullivan*, *Gertz*, Masson, and more) provided explications of the First Amendment and the equal protection of all citizens and not just elites. We ask this court once again to advise us, here what impingement's of their own constitutional interest in life, and liberty, and property, the individual must suffer in forfeits of dignity in order that the "press be free."

B. Disability Derogation, on that basis, by treating different Disabilities as Interchangeable and also individuals who suffer them, assails equal protection under the law, since when courts codify the conduct continues.

For the district court which supervised an old employment suit which Respondents deride, the problems a person in terrible pain might have had getting along seem

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[7] These equal protection concerns were also central in the discussion of liberty interests in *White Plains Towing v.Patterson, 991 F. 2s 1049.* also in the Second Circuit. Recent cases such as *Suzuki*, Ninth Circuit, reaffirming the roles of juries, places the present case in contrast in as much as there and elsewhere in the jurisdictions matters of truth and privilege reach a jury or at least a court restrains itself from ruling until there has been discovery (*Herbert v. Lando*, infra). .

[8] See e.g. Westlaw headnotes to this case, pointing to digest entries on the Consitutional, First Amendment and other federal law explicit aspects of this case.

[9] . These false allegations against Petitoners and the principal Petitioner especially are virulently threatening to good reputation in regard to local, national, and international disability support work which for some time and ongoingly are the major focus of Petitoner's time, energy, and dedication. They are not the type of allegations which a reader would bring home to the person targeted for clarification; they can and have already resulted in unfortunate disengagements by others, precisely what is conveyed by: avoidance and aversion.

top be taken as justification under the First Amendment for turning its own federal adjudicated physical disability Rehabilitation Act case on its head in accepting Respondents rendition of it as a mental case, and as an Americans with Disabilities Act case rather than a Rehabilitation Act case, which it actually was, and as if the standards and practices under those statutes do not differ, which they do.

Judge Broderick was very clear describing physical conditions and diagnoses:

> Plaintiff suffered during her employment from a physical disorder related to the nervous system. Her condition caused her to be unable to work at unpredictable times. Her unavailability for work lasted for varying lengths of time, sometimes for days; she had substantial absences in connection with her physical disorder, and as the result of surgery in 1985 to alleviate the disorder. ...Through at least the last seven years of her employment plaintiff suffered from sharp head pains and other symptoms associated with atypical trigeminal neuralgia, a disorder of the nervous system, [FN6] and she had attacks at unpredictable times. Plaintiff was in frequent communication with the employer's medical department, as were her own physicians, and plaintiff often worked "to tolerance" (that is, as much as possible) or for half-days. Plaintiff sometimes worked at home but not on a regular basis.

And while he based his decision to deny telecommuting on what plaintiffs then appealed as misprisions of job role, as Petitioner was a trainer and not a trainee, in no way did he describe an ADA case or a mental illness case. Most significantly, in no way did he say Trigeminal Neuralgia is not a serious physical malady; in fact he quotes Petitioner's very distinguished neurosurgeon on this very material point. From Judge Broderick's perspective he wrote about an individual., and an individual with physical disabilities.

For James McDonald however, this express information all goes by the boards.

> In the meantime, the EEOC and the courts should avoid further trivializing the ADA by extending its coverage to those whose only real affliction is manifest in an obnoxious demeanor, a disregard for the feelings of others, or a lack of respect for authority. The ADA was designed to give a fair shake to those with genuine disabilities, not to provide problem employees with a means of disguising their misconduct as disease.

In addition to falsifying an employment suit, defendants also invade Plaintiff-Petitioner's privacy by using her name and on false grounds to sell their story that the EEOC ADA Psychiatric Guidelines are letting in the door too many claimants. Over her name he places the heading: **"My Disability Made Me Do It."**

In clear anathema, and even though consenting to defendants' request to look at only one part of the text, a single paragraph in an entire publication (a matter to be briefed upon well settled defamation principles of total text and contextual analysis), the Circuit Court in affirming discussed not at all what First Amendment "truth" might mean here, or what is the freedom authors and publishers are meant to enjoy under their First Amendment rights, given publication of falsehoods. Nor did they discuss what "parody" might mean in general or in the setting of a federal district court decision.

There is much to be derived by the considerations in Masson v. New Yorker regarding the severe sting of misquotes about what someone has done or has said, which applies to claims about themselves, and their filings, on the part of persons with disabilities every bit as much as to anyone else.

> A trier of fact in this case could find that the reasonable reader would understand the quotations attributed to

Masson to be nearly verbatim reports of his statements. In general, quotation marks indicate a verbatim reproduction, and quotations add authority to a statement and credibility to an author's work. A fabricated quotation may injure reputation by attributing an untrue factual assertion to the speaker, or by indicating a negative personal trait or an attitude the speaker does not hold. ..

(c) The common law of libel overlooks minor inaccuracies and concentrates upon substantial truth. Thus, a deliberate alteration of a plaintiff's words does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725- 726, 11 L.Ed.2d 686, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789, unless it results in a material change in the statement's meaning...

However, if alterations give a different meaning to a speaker's statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable. ...

Although the Court of Appeals applied a test of substantial truth, it erred in going one step further and concluding that an altered quotation is protected so long as it is a "rational interpretation" of the actual statement. The protection for rational interpretation serves First Amendment principle by allowing an author the interpretive license that is necessary when relying upon ambiguous sources; but where a writer uses a quotation that a reasonable reader would conclude purports to be a verbatim repetition of the speaker's statement, the quotation ***498** marks indicate that the author is not interpreting the speaker's ambiguous statement, but is attempting to convey what the speaker said. *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45; *Bose Corp. v. Consumers*

Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, distinguished. Pp. 2433-2434.

[Masson v. New Yorker Magazine, **MASSON** v. New Yorker Magazine Inc., **501 U.S. 496, 111 S.Ct. 2419**].

C. The Court's grant of First Amendment immunities to defendants, and without citation of authority, and impingement on petitioners own right to free speech and petitioner in filing papers in their own voices and having the results be stabile, calls for supreme court review.

Review is ripe both as to these Petitioners, whose prior case, which was in repose, has been so unsettled by the false reports of the judicial proceeding, and who for several years now has endeavored to stem the false reports of the judicial proceedings in which they participated — and for all who are concerned with what is committed to computers and their capacity for copying over inaccuracies. The text of McDonald in near literal and sometimes altered form has as The Record shows crept onto the Internet.

The District Court received affidavits averring that successive renditions of McDonald's false reports would be withdrawn from the "Web" but to date they have not been. On the one hand there is HIPAA, the Health Information Portability and Accountability Act. On the other, there is First amendment protection for mislabeling disabilities and sending out the message unimpeded by rulings otherwise.

The Supreme Court has looked at cyberspace issues, as to for example, copyright law, and the virulent prospects of uncurtailed pornography, but has not especially looked to cybertorts directly and timing seems apt, and it is earnestly prayed they will do so, concerning this case where the headnotes in Westlaw and Lexis are already laced with digest printers to the First Amendment and the Constitution.

STATEMENT OF THE CASE

A. The filing of this suit upon repeated false and maligning publications by Defendant McDonald, describing her under the subhead banner "My Disability Made Me Do It!" as being a dismissed mental applicant under the ADA [sic] contrastive to his view of leniency in Ninth Circuit cases, even though she never brought an ADA suit at all or indeed one based on claims of a mental disorder.

As recounted generally above, on February 1, 2001 Plaintiffs brought this action, amending the Complaint August of2001 thereafter before the pre-answer, pre-discovery motion to dismiss.

B. The Record at the District Court Level including pre-service dismissal and then dismissal on no delivery of proof of service before it could be mailed back from out of state shows impermissible haste overall, affronting the FRCP and chilling Petitioner's Rights not appropriate for First Amendment Rulings and a gravamen of disability.

The District Court's early dismissals based on impossible findings early announced that plaintiffs would be treated as ones with inferior rights even though the court would award a first amendment defense to the defendants who did not claim one.

The Motion to Dismiss filed September 6, 2001, followed delivery of Plaintiffs' Interrogatories on a short five day schedule from start to completion allowed by the Magistrate, with Defendants withdrawing from conversation.

On requirement of brief on Aspen's headquarter status when the case was filed, Plaintiffs prevailed in subject matter jurisdiction. [App. Pet.] The court declined to hold an evidentiary hearing on the author's purposeful availment of the New York forum (under *Zippo* and other case law), in spite of multiple exhibits on his publishing endeavors with

New York houses and an interactive, funds producing Web by Petitioners in both prima ultimate facts and with proffers of evidentiary facts as well from their research.

The court ordered, adjudged, and decreed"

> That the complaint be and is hereby dismissed because the publication is privileged and not actionable, the complaint is dismissed for failure to state a claim as to defendant Aspen Publishers, Inc. and as an alliterative ground in addition to the jurisdictional issue discussed. The court concludes that it must be dismissed for the same reasons as to the author, McDonald and his law firm.

The Court provided this statement on First Amendment privilege (supra).

As the decision shows, in looking to ancient facts in an employment suit which the selfsame court supervised, and not instant facts as asserted by plaintiffs, the court virtually set back the clock in accepting the defendant's averments that past employment matters (of their selection from a prior federal decision) should be, as they were, substituted for the complaint. By this process the movant's point of view ws prohibitively frontalized; the court's adoption and rendition (with interpolated and dismissing interpolated but not so indicated] concerning issues in getting along in the workplace when extremely ill are plainly spread on the Record.[10] Which defendants painted as bizarre rather than inherent. To firm up this viewpoint and justify inclusion in an ADA mental illness publication where others were featured who had trouble getting along but the author says they had no real ailment yet filed ADA suits, the court copies

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[10] This subsumng of past and collateral facts over present facts in a case in tort swallowed the issues of defamation and other causes of action. The Decision reads as if denial of appeal on an old employment suit and a resumed merits dismissal, rather than the disposition of a case in libel and other harms..

into the Decision a recitation of putative employment suit losses by plaintiffs; these include a slip and fall injury resulting in thrombotic phlebitis on a sidewalk in a village (not related to employment and omitted are the cases where plaintiffs saw success including in appellate rulings.

Judge Brieant ruled separately and we direct attention to his view that it would be 'prior restraint' to issue an injunction against repetition of the false and libelous material. He also declined to before publication adjust the list of ostensibly employment case dismissals prior recounted by defendants, even though plaintiffs prevailed in some instances as recorded in appellate division law, and as published – including the appellate second's decision that the charges lodged against Plaintiff by a co-worker (and mentioned by Judge's Broderick and Brieant of the same court) Plaintiffs separately briefed for Judge Brieant the true history of cases but the published decision does not reflect this. [Correspondence of Record[.

C. The Record at the Second Circuit Level including relying on a state appellate (separate suit) decision which itself relied on the same district court.

The Second Circuit removed itself from direct supervisory review of its District Court, reporting that an intermediate appellate state court in a separate case had decided the matter (citing to *Fieger v. Pitney Bowes Credit Corp.* , 251 F.3d 386 , C.A.2 (N.Y.),2001). It held that it must take the state appellate ruling as a "datum" in its affirmation of the District court, and declined to review the other data relevant to the instant controversy – the contents of the actual complaint and of the article itself. [

That is, the Circuit does not discuss other data to be considered such as the timing of the motion to dismiss before defendants had to answer the Complaint or cooperate in discovery, the fact that multiple issues plead in the amended complaint and the totality of the publication other than a

single paragraph, or techniques of analysis and review pertinent in defamation and other tort rubrics.

The Second Circuit Court of Appeals declined to rehear or reconsider, on the part of the deciding panel or *en banc* with the full bench; (Authority produced by the plaintiffs is of record and was presented in addition to briefing, and such as appears below as an Appendix).

REASONS TO ALLOW THE WRIT

A. The federal District and Second Circuit Court of Appeals court denied equal protection and due process substantively in multiple ways projecting an impermissibly treatment of persons with disabilities discriminatorily as an *underclass*.

1. First, as to substance, the District Court improperly construed then attacks on Petitioners as umbrella "parody," and erred in granting the defendants First Amendment immunity from suit.

The District Court improperly construed as "parody" (implying discernible figurative language which would not be take literally), and granted the defendants First Amendment immunity from suit, where (a) there are no indications of humor in their publication's ascription of a mental disorder, or a profligate claim of a mental disorder, and (b) they claim that a federal court had so found, and (c) no mention of the actual physical disorder (Trigeminal Neuralgia, or Tic Doloroux) suit brought under the Rehabilitation Act is made in the publication concerning ADA claimants under Equal Employment Opportunity Commission psychiatric guidelines.

> Moreover, the Court made clear that by protected type of speech it had in mind the rhetorical hyperbole, vigorous epithets, and lusty and imaginative expression found in *Hustler Mag. v. Falwell,* 485 U.S. 46, 108

> S.Ct. 876, 99 L.Ed.2d 41 [ad parody]; *Letter Carriers v. Austin,* 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 [labor dispute], and *Greenbelt Publ. Assn. v. Bresler,* 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 [heated real estate negotiation]--all instances where the Court had determined that the imprecise language and unusual setting would signal the reasonable observer that no actual facts were being conveyed about an individual. In *Milkovich,* the Supreme Court resolved "type of speech" considerations in two sentences: "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury.
>
> [Immuno AG. v. Moor-Jankowski, 77 N.Y. 2d 535, 250 (1991).

As remarked in a often quoted exegesis on language not to be taken as literal, the New York Court, whose laws the second circuit writes it must honor, observes:

> Hence, even if we agreed with plaintiff that the statement would not have been construed by the listeners as rhetorical hyperbole, the cause of action must nevertheless be dismissed because it is not slanderous per se to claim that someone committed harassment.
>
> [*Liberman v. Gelstein,* 80 N.Y.2d 429, *436, 605 N.E.2d 344, **348, 590 N.Y.S.2d 857, ***861 (N.Y.,1992)].

But here the assertion made is set forth as fact, for al of the surrounding "jokes" discriminatory against persons with disabilities including jokes about the blind and deaf which if argued as parody the question becomes parody of what – and what is being ridiculed. Here, again, imputations of mental dysfunction are *supposed to be* actionable per se.

As a threshold issue and as pointed out here *supra* by headnote and as defendants own attorney has written, false

accusations of mental disorders are actionable per se hence at least susceptible to being defamatory; the issue of whether this is fair reporting or indeed defamatory ought to have gone to a jury.

The District Court improperly construed as "parody," and granted the defendants First Amendment immunity from suit, where (a) there are no indications of humor in their publication's ascription of a mental disorder, or a profligate claim of a mental disorder, and (b) they claim that a federal court had so found, and (c) no mention of the actual physical disorder (Trigeminal Neuralgia, or Tic Doloroux) suit brought under the Rehabilitation Act is made in the publication concerning ADA claimants under Equal Employment Opportunity Commission psychiatric guidelines.

2. As to the constittutional protected right to petition, the federal district court absorption of court-criticisms avowedly under the First Amendment does not in any event relieve Petitioners of the strains of being materially mischaracterized, affronting their own First Amendment Rights to reputation, life, liberty, and property as individuals- and without application of relevant substantive law of the forum.

According to the District Court and affirmed by the Second Circuit, mischaraterizationss of disabilities are not actionable when perpetuated by writers on legal proceedings – and one injured thereby. The right to petition now comes under question as regards persons with disabilities. The level of scrutiny should be examined to ascertain if it is even minimal scrutiny, as no rational basis explanations are efforted.

> Dr. Misek-Falkoff's criticism of the article is not totally lacking in validity. Her sole remedy is to write an article of her own, in order that the different views of the condition of employment litigation may be resolved in the intellectual marketplace as a result of public

> discussion, expected to be "robust" and fully protected as to all participants by the First Amendment. [District Court, APP. Pet. C].

The federal courts themselves are mocked here, as representing :"muddle judicial thinking." perhaps in an undenting outcome for them, but impermissibly at the principal Petitioner's expense as a person with disabilities, and on an unconstitutionally discriminatory basis (her disabilities being approached with sub minimal scrutiny), in sporting fashion as if all individuals with disabilities are the same, and denying diversity. Petitioners should have equal protection under the First Amendment and the Fifth Amendment's warrants.

The court's improperly accepted and adopted defendant-respondents claim that a defamation suit with a ruling of parody could under the First Amendment protect a journalistic account where unquestionably the false allegations would and will (see republications which have occurred) be taken as fact.

3. Third, both federal courts deprived Petitoners of equal protection of the First Amendments rights to free speech and to petiton the government on grievances.

Plaintiffs should not be bereft of first amendment remedies for defamation in the present on the basis of such facts as defendants and the court adopting) took from an worksite suit (and not attending present facts of what the publication said en toto).[11]

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[11] The reach to substitute a heap of dismissals for present analysis is shown in the inclusion of a slip-and fall on a village sidewalk resulting in thrombotic phlebitis, but catalogued by defendants and the district court as an employment suit, not oddly in a list of actions the court found in nexus and not separate. . (??? App. Pet. ___). The court questionably stepped aside from its own desire to preserve case outcomes under it in the past since it supervised the original employment suit in its very halls

> Even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the " `public airing of disputed facts,' " Bill Johnson's, supra, at 743 (quoting Balmer, Sham Litigation and the Antitrust Law, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L. J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims.
>
> [B. E. CONSTRUCTION CO. v. NATIONAL LABOR RELATIONS BOARD et al. , certiorari to the united states court of appeals for the sixth circuit - No. 01-518. Argued April 16, 2002--Decided June 24, 2002. ??? supreme court?

The District Court (and Second Circuit affirming) (a) overrode and overwrote a settled, past employment suit outcome and supplanted the role of the jury to weigh the significance of mischaracterization sand to hear witnesses expert and lay. [On briefing, it could be fruitful to consider from *Marbury v. Madison* [cite omitted] times forward (or even before) what rightfully or usefully comes under the purview of courts. Relative to Trigeminal Neuralgia, which defendant-Respondents here stand pleased to rediagnose, it is for the legislature to revise what law there is on medical classifications. Trigeminal Neuralgia I physical (see numerous case cites in App. Pet. ___] below, and its blights

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– but this does not bode well for the right to petition including on the part of persons with disabilities if equal status is preserved..

well documented worldwide; and see the first Headnote, above, where New York Executive Law twice uses Dr. Misek-Falkoff's federal suit to illustrate physical disorders – both under headings of discrimination and human rights]

> The Legislature may not confer lawmaking or nonjudicial duties on the courts, for to do so would disturb the division of power among the three departments of government. [McKinney's Statutes § 3]

New York and comon law across the for a is clear on incoluding all issues plead and all a text in entirety As to the text of a Complaint,

> The inquiry is, then, into the natural effect of the publication, not only upon the general public, but upon the neighbors and friends of the person aimed at") (citation omitted); Bennet v. Commercial Advertiser Co., 230 N.Y. 125, 127 (1920) ("the accusation which dishonors or discredits a man in the estimate of the public or his friends and acquaintances or has a reasonable tendency so to do is libelous"). The Court must also consider the context of the defamatory comments. Immuno AG v. Moore-Jankowski, 77 N.Y.2d 235, 250 (1991) ("It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole").

As to the text of an offending publication,

> The allegedly libelous statements can be categorized as follows: (1) *The Religious Controversy:* statements 1, 2, 4, 5, 12, 13, and 14 deal exclusively with the religious controversy surrounding plaintiffs; (2) *The Business Controversy:* statements 3, 6 and 7 pertain solely to the business controversy surrounding plaintiffs; (3) *Hybrid statements:* statements 10 and 11

pertain to both the religious and the business controversy; and (4) *Father O'Reilly's marital status:* statements 8 and 9 address the marital status of one of the individual plaintiffs...

[grant summary judgment to Defendant with respect to plaintiffs' second (in part), third, sixth, seventh, eighth, ninth, and thirteenth claims because they are either not defamatory or not false or both. [CONTEMPORARY MISSION, INC., et al. v. NEW YORK TIMES, No. 80,Civ. 6587 (VLB)].

4. Fourth, it is a serious issue whether juries not judges should according to well settled law decide the seriousness of what the court acknowledges to be mischaracterizations and here about disabilities and the intention and conduct of those who have them and come to court for relief.

We *666 are similarly of the view that a jury question is also presented with respect to Defendants' defense that the article's account of the imposition of a fine against plaintiffs in Justice Court was statutorily privileged as a "fair and true report of any judicial proceeding" (Civil Rights Law § 74). The "neutral reportage" privilege does not apply when the news account of the judicial proceeding is combined with other facts or opinions to imply wrongdoing (*Russo v. Padovano,* 84 A.D.2d 925, 926, 446 N.Y.S.2d 645). Since, as previously discussed, the account of plaintiffs' fine omitted disclosure that it related only to a violation of labeling requirements and can be read with other portions of the article to suggest more serious misconduct, resolution of this defense must also await a plenary trial. [*Ocean State Seafood, Inc. v. Capital Newspaper, Div. of Hearst Corp.* 112 A.D.2d

[12] SeeB. E. Construction,

662, *664, 492 N.Y.S.2d 175, **177 (N.Y.A.D. 3 Dept.,1985)].

And more receltly the separate-circuit circuit case of *Suzuki* (to be briefed) in the 9th circuit emphasized the jury's role as fact-finders, once again illustrating the collision of the instant outcome with all venues including its own.

B. The federal district court and circuit court of appeals denied equal protection and due process procedurally, multiple ways also projecting impermissibly treatment of persons with disabilities discriminatorily as an *underclass*.

1. First, as to preclusion, the Second Circuit court improperly affirmed it's District Court's Dismissal not by citing substantive forum law, but by granting defendants relief of preclusion from suit through referring to an intermediate state court decision which itself cut down the separate case it cites on grounds of preclusion – down to only one issue on only one paragraph and allowed and overriding the well settled federal employment suit outcome.

> Under New York law, collateral estoppel prevents a party from re-litigating an issue decided against that party in a prior adjudication. It may be invoked to preclude a party from raising an issue (1) identical to an issue already decided (2) in a previous proceeding in which that party had a full and fair opportunity to litigate. Additionally, the issue that was raised previously must be decisive of the present action." Curry v. City of Syracuse, 2003 U.S. App. LEXIS 551 *14-15 (2d Cir. Jan. 15, 2003) (citing Fuchsberg & Fuchsberg v. Galizia, 300 F.3d 105, 109 (2d Cir. 2002); LaFleur v. Whitman, 300 F.3d 256, 271 (2d Cir. 2002)).

> "An issue is 'decisive in the present action' if it would prove or disprove, without more, an essential element of any of the claims set forth in the complaint. A stricter definition of the term would render collateral estoppel virtually indistinguishable from res judicata; a broader definition would leave the additional requirement of 'decisiveness' without meaning." Id. at * 18.

2. Next is is the issue of circularity in avoiding review of its own district court by accepting the view of a state intermediate appeallate court adopting the district court's view.

Put another way, it seems fruitful for all coming under the law and especially in instances of repetitive tort-feasing where crossover decisions might block all access to justice, this court can assess the circularity of confounding decisions which can encourage bad acts simply by "forum" shopping as to where to calculatedly commit them? The present outcomes seem to say yes but legal precedent and logic and fairness say no.

Did the District court indeed by circularity and passthrough methods of transparency or otherwise virtually affirm itself though a ladder of references outside the box? And should one publication of libel induce and even reward libeling by simply to simply publish again in different venues *where jurisdiction might be questioned*, and escape accountability in any of them?

3. Finally, the stage of the proceedings under the Federal Rules of Civil Procedure do not support the dismissal and speaks very poorly for federal practice[13].

But equally glaring is that no court has yet faced the issues in the complaint. The Judge Brieant dismissed on First Amendment grounds before joinder and development of a Record; not explaining how he reached his declarative conclusions. The state appellate court which cites to Brieant thereafter equally evades the accusations of malingering. It says that physical means mental; and the second circuit cites them and refuses to review its subsidiary district court.

The Supreme Court can review gainfully for all whether or not disabilities and the persons who suffer them to treat them as interchangeable and heap on derision, either in misreporting the cases they bring or in saying the truth does not matter. This mockery does not excuse defamation or lighten the injuries that libels cause, or bring it properly within the ambit of the Federal Constitution to label such acts true reports as the District Court did.

And did The district court not reasoning from precedent (as conceded by the Panel at Second Circuit Oral Argument) but simply by declaring privilege eviscerated Plaintiffs' First Amendment Rights to free speech and to petition, in overriding the prior decision of a judge in his own court who documented a physical pain disability not a mental disorder, and by providing a first amendment defense which the constitution and the case law cannot support., either treating disability derision as parody, or restricting the issues to just one from all plead.

The outcome is that prologue through epilogue, persons with disabilities by adverse court impact and

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[13] The usual timeline can be found in Cound and Friedenthal, Friedenthal and Kane, .and many other sopurces as a defined F.R.C.P. route thorugh cases, and usually highlight Discovery as a key phase in an action. .

extendedly as a member of a vulnerable class already subject to false stereotyping enigmas, becomes an underclass in the courts and not treated with dignity or their cases allowed to proceed on equal footing with others even so far as serendipidies of life and law can solve problems.

The District court appears not to even have afforded minimal scrutiny. The second circuit court of appeals affirming then created intersystem problems by relinquishing its supervisory functions and turning to a state decision which itself turned to the selfsame District court on a revolving door basis. The short shrift and sub-minimal scrutiny which both courts afforded the petitioners and on the basis of disability discriminates against on basis of disability by enforcing unjustified and prejudicial stereotypes of medical conditions adverse to both the individual and all individuals as focus of civil rights legislation.

The lack of hearing on the chief defendants forum contacts to show purposeful availment simply highlights the due process and equal protection flaws here in that McDonald published and advised in the state and plaintiffs proffered ample evidence of interactive web sites.

We respectfully pray that whether spoken of as turn-stile, revolving, or ricochet "jurisprudence," the doors of the court will stay open even for those whose detractors have finesse in their "moves." Persons with disabilities to be included at full power under the rights known to others.

Please consider Petitioner's plea that the courts should not look aside from prejudice and falsities to reward glib humor as a thick coat over published, factual allegations which are embedded with surrounding wit if wit it be, but which straightforward factual misrepresentations of judicial proceedings are damaging and retaliatory. And please advise whether The First Amendment properly supports the relief here granted defendants on a preemptory FRCP 12b motion to dismiss, relieving the defendants of having to Answer and cooperate in Discovery, where the court itself

sets forth that the non-movant Plaintiff 'Is not entirely wrong" but pushes the case out the door.

SUMMARY

Declaring physical pain and here severe neuralgia condition (which public literature confirms can throw one to the floor) to be mental a mental disorder is declaring migraine headaches or sciatica or limb wounds to be mental disorders; neuralgia is not a brain condition nor a mental one neuralgia comes from wounded nerves as the prior federal court correctly preserved in describing this difficult and daunting physical condition.

The author in his writings does not mention the actual physical pain, just averring Petitioner suffers and claims to suffer a mental disorder and that a federal court so found [sic]. In so averring, he relies on his own agenda; no expert or lay witness was ever brought forth (but see the affidavit of a qualified clinician in sworn testimony controverting McDonald (App. Pet. E). It is quizzical why Aspen Press which provides such fine publications in health and law and other fields would countenance such misrepresentations in these same fields except that a cat was out of its bag here. This does not change the medical facts, or the law.

Inconsonantly, citing each other, the federal and state courts here never really tackle the problem of justifying (and on federal grounds and state statute grounds reflecting constitutional provisions both federal and state) their decisions in favor of media here that neurological pain conditions are mental disorders. This position they reach before discovery, before compiling evidence, and not requiring the defendants to pose an Answer.

Petitioners respectfully submit that where no one take the responsibility for First Amendment defenses and although lofty they are in particular instances lightly bestowed, then they should be void as frivolous or otherwise undeserved. The Supreme Court has labored long and wisely to explicate the first amendment for its defamation dualisms

– protecting the presses freedoms which maintaining rights of individuals as closely as the High court could be bring balance to these balancings. It does not serve for courts to idly or with *sub minimal scrutiny* toss around the First Amendment pass from suit or deny the individual redress for false and injurious bald misreports.

C. And finally, in the interests of substantial justice, this case should see its day in court.

No court save one that provided First Amendment immunities cryptically, and without presenting supporting law, has yet addressed the issues in the Complaint.

The Supreme Court can review whether or not disabilities and the persons who suffer them, and what actions they legitimately file, and what outcomes they experience, deserve to be treated as interchangeable with heaped on derision, either in misreporting the cases they bring or in saying the truth does not matter. In Petitioner's understandings, this mockery does not excuse defamation or lighten the injuries that libels cause, nor should ridicule serve to bring it properly within the ambit of the Federal Constitution to label such acts true reports as the courts here have done.

Further, we most respectfully submit, ***special interests*** should not be immunized from suit by alterations of duly filed complaints, such as here, which operation reduce several issues to one, and especially where that one is fashioned from the opposition's perspective. These; exercises distorting information are especially glaring where the information is medical, and in today's context of electronic transmission, storage and sharing of data, here involving EMR – electronic medical record processing which cross-data-mines in building new data bases — and as reflected in the HIPAA and other law and policy. Further, due process on the timeline in development of suit is important to all jurisdictions and all venues.

CONCLUSION

The Petitioners respectively request that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Most respectfully submitted,
Most Respectfully Submitted,

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APPENDIX

APPENDIX A: PROVISIONS OF LAW

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment to the U.S. Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the U.S. Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, that according to the rules of common law.

The Fourteenth Amendment to the U. S. Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Americans with Disabilities Act provides:

Who Is Protected Under the ADA? The ADA protects qualified *individuals* with disabilities. An *individual* with a disability is a person who has a physical or mental impairment that substantially limits major life activities; has a record of such an impairment; or is regarded as having such an impairment. Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Under the ADA, a qualified *individual* with a disability is an *individual* with a disability who meets the essential eligibility requirements for receipt of services or participation in programs or activities. Whether a particular condition constitutes a disability within the meaning of the ADA requires a *case-by-case determination.* (The Office for Civil Rights, Your Rights Under the AMERICANS WITH DISABILITIES ACT – web site address: http://www.hhs.gov/ocr/ada.html).

New York State Constitution, Article I.8 provides:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for

the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

New York State Civil Rights Law, Article 7 § 74 provides:

Privileges in action for libel. A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

[1] **NEW York CIVIL RIGHTS §40-c Discrimination**
5. Physical disability
Misek-Falkoff v. International Business Machines Corp. 854 F.Supp. 215.

NEW YORK EXECUTIVE LAW §296 Human Rights
104. Physical disability, Generally, Employment.

Misek-Falkoff v. International Business Machines Corp. 854 F.Supp. 215.

APPENDIX B — Summary Order of the Second Circuit Court of Appeals Aril 24, 2003.

United States Court of Appeals,
Second Circuit.

Linda D. MISEK-FALKOFF and Adin Falkoff, Plaintiffs-Appellants,

v.

James J. MCDONALD, Jr., Employee Relations Law Journal Editorial Board,

Employee Relations Law Journal, Fisher and Phillips, L.L.P., and Aspen

Publishers, Inc., Defendants-Appellees.

Docket No. 02-7091.
April 24, 2003.

SUMMARY ORDER

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED.**

Linda Misek-Falkoff and her husband, Adin Falkoff filed a complaint in this diversity action on February 1, 2001, principally alleging that defendants defamed Misek-Falkoff in an article written by defendant McDonald and published by Aspen Publishers in the Employee Relations Law Journal. The relevant passage of the article discusses the opinion by the United States District Court for the Southern District of New York (Vincent L. Broderick, *Judge*) in a previous lawsuit filed by Misek-Falkoff. It reads as follows:

In *Misek-Falkoff v. IBM Corp.*, 854 F.Supp. 215 (S.D.N.Y.1994), affirmed, 60 F.3d 811 (2d Cir.1995), the

plaintiff was placed on permanent disability status after a series of emotional outbursts, fits of rage, and altercations with supervisors and coworkers. She sued, alleging that she was discriminated against *on account of her mental disability,* but her suit was rejected. The court assumed that the plaintiff was disabled but went on to hold that she was nonetheless unqualified for her job, even though she may have been technically competent. The court observed that it is a requirement of any job that an employee--disabled or not--be able to get along with coworkers and supervisors, and that an employer certainly may require its employees not to cause or contribute to disruptions and hostility in the workplace.

James J. McDonald, Jr., *The Americans with Difficult Personalities Act,* 25 Employee Relations Law Journal 93, 99-100 (2000) (emphasis added).

Plaintiffs allege that this passage was both inaccurate and defamatory because Misek-Falkoff's disability was, in fact, based upon a neurological disorder that constitutes a physical disability rather than a mental disability. They also point out that the article inaccurately implied that Misek-Falkoff's disability discrimination claim was brought pursuant to the Americans with Disabilities Act when, in fact, it was brought pursuant to section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

On September 6, 2001, defendants filed a motion to dismiss. The District Court granted defendants' motion on November 19, 2001, holding that (1) it lacked personal jurisdiction over defendant McDonald and defendant Fisher & Phillips, L.L.P. and (2) plaintiffs had failed to state a claim upon which relief could be granted.

Substantially for the reasons stated by the District Court, we hold that personal jurisdiction is lacking with respect to McDonald, a lawyer living and practicing in the

state of California, and Fisher & Phillips, L.L.P., the Atlanta, Georgia-based law firm that employs McDonald in its Irvine, California office.

Furthermore, the District Court properly concluded that plaintiffs have failed to state a claim upon which relief can be granted. Notably, plaintiffs brought a near-identical law suit to this one in New York state court with respect to another article published by McDonald that contained substantially the same paragraph at issue in this case. *See Misek-Falkoff v. American Lawyer Media, Inc.*, 300 A.D.2d 215, 752 N.Y.S.2d 647 (1st Dep't 2002). The First Department affirmed the lower court's dismissal of that case, holding that "dismissal of the complaint is mandated pursuant to Civil Rights Law § 74, which forbids the maintenance of a civil action 'against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding.' " *Id.* at 648-49. The court reasoned:

> The only inaccuracy in the article's description was that it stated that plaintiff Misek-Falkoff "filed a lawsuit alleging that she was discriminated against because of her mental disability"; in fact, the IBM Action says Misek-Falkoff sued for discrimination based on a "neurological disorder" (854 F.Supp. at 226). This inaccuracy is not serious enough to remove defendants' reportage from the protection of Civil Rights Law § 74.
>
> *Id* at 649 (citation omitted).

We have made clear that "[t]he holding of 'an intermediate appellate state court ... is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 399 (2d Cir.2001) (quoting *West v. AT&T*, 311 U.S. 223, 237, 61 S.Ct. 179, 85 L.Ed. 139 (1940)). Plaintiffs have provided no

such persuasive data in this case, nor have they adequately distinguished the issues presented in this case from those resolved by the First Department.

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

63 Fed.Appx. 551, 2003 WL 1971793 (2nd Cir.(N.Y.)), 31 Media L. Rep. 1632, 25 NDLR P 337

APPENDIX C – Memorandum & Order of the District District Court.

S.D. New York.

Dr. Linda D. MISEK-FALKOFF and Adin D. Falkoff, Plaintiffs,
v.
James J. MCDONALD Jr., Esq. Employee Relations Law Journal, Editorial Board,
Employee Relations Law Journal, Fisher and Phillips, LLP, Aspen Publishers,
Inc., Defendants.

No. 01 CIV 0816(CLB).

Nov. 19, 2001.

Memorandum & Order

BRIEANT, District Judge.

In this diversity suit based on defamation and related torts, Defendants by motion filed September 6, 2001, heard and fully submitted on November 16, 2001, moved for an order pursuant to Rule 12(b) F.R.Civ.P.: (1) dismissing the suit for lack of subject matter jurisdiction; (2) dismissing as to James J. McDonald, Jr., and Fisher and Phillips, L.L.P., for lack of personal jurisdiction; (3) dismissing as against McDonald for insufficiency of process; (4) dismissing against Defendants' Employee Relations Law Journal and Editorial Board Employee Relations Law Journal (the "Board") pursuant to Rule 17(b) F.R.Civ.P. for want of capacity to be sued, and; (5) dismissing the Amended Complaint for failure to state a claim.

At the oral argument Plaintiffs conceded that the action must be dismissed against defendants Employee Relations Law Journal and Editorial Board, Employee Relations Law Journal, and that branch of the motion is granted.

In their opposition papers, Plaintiffs seek injunctive relief and also ask this Court to permit them to take discovery if Defendants' motion to dismiss is granted. Finally, in the conclusion of Plaintiffs' opposition submission, they ask this court "in its own terms and on its own timing to consider conduct of Counsel and dispatch it accordingly, by consideration under Federal Rule 11, or simply as advisement of the expected manner conduct including proper representation of case law findings, and decorous personal interaction, as the case presumably moves forward in orderly fashion."

Background

The following facts are assumed to be true for purposes of the motion. From approximately 1977 through June 1987, Plaintiff, Dr. Misek-Falkoff, was actively employed by International Business Machine Corporation ("IBM") in various positions. In 1987, IBM placed Dr. Misek-Falkoff on permanent medical disability leave based, in part, on a "debilitating pain condition of Trigeminal Neuralgia", which she developed in or about 1980 and remained "for some time, grew worse and was finally diagnosed as a physical disorder of the Fifth Cranial nerve". Subsequent to the termination of her active employment with IBM, Dr. Misek-Falkoff (sometimes with her husband Plaintiff, Adin D. Falkoff) filed several lawsuits against various entities, including IBM, that all relate in some manner to this litigation. [FN1]

FN1. The following are list of Plaintiffs other cases: *Misek- Falkoff v. IBM,* 162 A.D.2d 211, 556 N.Y.S.2d 331 (1st Dept.), *lv to appeal denied,* 561 N.E.2d 890, 560 N.Y.S.2d 990, 76 N.Y.2d 708 (1990) (tort action against IBM dismissed); *Misek-Falkoff v. IBM,* Index No. 9938/88, New York Supreme Court, Westchester County, N.Y. Law Journal, May 9, 1991 (action against IBM seeking injunctive relief dismissed); *Misek-Falkoff v. Keller,* 153 A.D.2d 841, 545 N.Y.S.2d 360 (2d Dept.1989) (tort action against employee of IBM dismissed); *Misek-Falkoff v. IBM,* 854 F.Supp. 215 (S.D.N.Y.1994), *aff'd,* 60 F.3d 811 (2d Cir.1995), *petition for rehearing denied,* 517 U.S 1230, 116 S.Ct. 1871, 134 L.Ed.2d 968 (1996) (discussed herein); *Misek-Falkoff v. Village of Pleasantville,* 207 A.D.2d 332, 615 N.Y.S.2d 422 (2d Dept.1994) (action against Village dismissed); *Misek-Falkoff v. Donovan,* 250 A.D.2d 579, 671 N.Y.S.2d 986 (2d Dept.1998) (action against State Supreme Court Justice dismissed); *Misek-Falkoff v. American Lawyer Media, Inc.,* Index No. 103099/00, Supreme Court, New York County (motion to dismiss defamation action *sub judice.*)

IBM Action

Of the several lawsuits filed by Plaintiff(s), the one most relevant to this case is *Misek-Falkoff v. International Business Machines Corporation,* 854 F.Supp. 215 (S.D.N.Y.1994) (Broderick, J.) affirmed 60 F.3d 811 (2d Cir.1995), (hereinafter, the "IBM Action"). In the IBM Action, Plaintiffs alleged, *inter alia,* that IBM had violated section 504 of the Rehabilitation Act, 29 U.S.C. § 794, by placing Dr. Misek-Falkoff on permanent disability status. *Id.* Specifically, Dr. Misek-Falkoff argued that as a result of her neurological disorder she was "handicapped" for purposes of the Act, and that IBM placed her on inactive status *only* because of her handicap and, thus, violated the statute.

Ultimately, Judge Broderick rejected Dr. Misek-Falkoff's claim. In so doing, Judge Broderick first explained that under the Rehabilitation Act, Plaintiff was entitled to relief only if she were *both* handicapped *and* otherwise qualified to perform the essential duties of her position. Assuming for purposes of IBM's summary judgment motion that Dr. Misek-Falkoff was handicapped, Judge Broderick concluded that she was not otherwise qualified and granted IBM summary judgment. Judge Broderick held:

Through at least the last seven years of her employment [Dr. Misek-Falkoff] suffered from sharp head pains and other symptoms associated with atypical trigeminal neuralgia, a disorder of the nervous system, and she had attacks at unpredictable times. Plaintiff was in frequent communication with the employer's medical department, as were her own physicians, and plaintiff often worked "to tolerance" (that is, as much as possible) or for half-days. Plaintiff sometimes worked at home but not on a regular basis.

Beginning in 1984, plaintiff's medical condition worsened. She was frequently absent, sometimes for extended periods, due among other things to hospitalization in connection with medical tests and brain surgery in July of 1985, and to emotional reactions to work-related experiences. She received satisfactory personnel appraisals in June 1982, August 1983, September 1984, and December 1986.

[Notwithstanding], [e]ven when plaintiff was present in the workplace there were problems: plaintiff at times exhibited fits of rage, emotional outbursts, crying episodes and similar behavior, making it difficult if not impossible for many co-workers and supervisors to get along with her. The extent to which these episodes were directly related to, the result of, or independent of her physical condition is unclear.

An incident triggering events leading to this lawsuit occurred on May 29, 1985. When the departmental

computer trainer failed to include plaintiff in a training session, an altercation erupted. The computer trainer transmitted an account to his manager and others by electronic mail alleging that plaintiff had attempted to assault him. Plaintiff vigorously denies the computer trainer's version of this incident: plaintiff claims that at most she brought her hand down "in frustration" on a table next to the place where the computer trainer was sitting, denting some slides in a binder. Both employees appear to have been shaken by the incident, as was a third employee, who observed the encounter and claimed thereafter to be afraid of plaintiff.

Several weeks later, plaintiff was involved in a second incident, this time with her manager, in which plaintiff claims that the manager grabbed from plaintiff's hand a telephone which then brushed plaintiff's face. Believing that she had been assaulted, plaintiff called for help from the building security and medical departments. Immediately after this affair, the manager requested to be relieved from supervising plaintiff and was replaced by a more senior manager.

[I]n the summer of 1985, plaintiff had neurological brain surgery and was out of work for three months. Upon her return in mid-October 1985, ... Plaintiff's managers determined that plaintiff should be handled "from a medical standpoint." This approach was developed as a result of two personnel investigations.

Mandatory disability had been first considered with respect to plaintiff in early 1986. Plaintiff's managers had by-passed the administrative approach leading to possible termination without benefits and applied instead, in accordance with company policy, for her placement on the employer's Mandatory Disability Insurance Plan ....

In April 1987 medical disability was [first] considered again based on [Dr. Misek-Falkoff's] increased absences and diminished productivity. A review by the

employer in June 1987 led to a decision to place plaintiff on medical disability.

On July 6, 1987 after unsuccessful attempts to meet with plaintiff, the Director of Computing Systems notified her by telephone at home that she had been placed on the employer's Medical Disability Insurance Plan on a mandatory basis and could not return to work. Plaintiff was told in a letter dated July 6, 1987 that the decision was made "in light of your medical history after careful consideration of your high absence record, your periodic disruptive, unbusiness-like conduct at work and your inability to perform the requirements of your position consistently."

She was in fact placed on inactive status that day, with the option of accepting or rejecting the benefits available under the employer's disability plan. Plaintiff's benefits under the plan include 40% of salary as well as dental and medical health benefits until the age of 65, and retirement benefits thereafter. Plaintiff has accepted these benefits.

Employee Relations Law Journal Article

Defendant McDonald, a citizen and resident of the State of California, [FN2] is a lawyer and partner in the Irvine, California law office of Defendant Fisher & Phillips, and an author of a column entitled "Lex Mentis" that appears in the quarterly journal of Defendant Employee Relations Law Journal. *See* McDonald Dec. at ¶ ¶ 2 & 5. The Employee Relations Law Journal is part of Defendant, Aspen Publishers, Inc.'s ("Aspen"), "Law and Business II" publishing unit. *See* Declaration of Jane Butler, dated September 5, 2001, ("Butler Dec.") at ¶ 4. Aspen's Law and Business II unit is based and run out of Aspen's New York office, which Jane Butler, Aspen's President and CEO, states is Aspen's principal place of business. *Id.* ¶ ¶ 2 & 5.

FN2. *See* Declaration of James J. McDonald, Jr., dated September 4, 2001, (the "McDonald Dec.") at ¶ 2.

Mr. McDonald prepares and writes each article for his column in California. Upon completion, Mr. McDonald e-mails his drafts to Dianne Scent, an Editor of the Law Journal, who resides and works in Piscataway, New Jersey. Thereafter, Ms. Scent and Mr. McDonald communicate by phone and e-mail, and Mr. McDonald sends a hard copy of all final drafts via mail to Ms. Scent in New Jersey [FN3]. *See id.* ¶ 6.

FN3. In his declaration submitted in support of Defendants' motion, Mr. McDonald also states that he receives no compensation for writing the Lex Mentis column, has "no contact whatsoever with any person or entity located within the State of New York in the course of preparing, writing, or proofing the Lex Mentis column." McDonald Dec. at ¶ 6.

In the Spring of 2000, following the exact procedures described above, Mr. McDonald authored an article entitled "The Americans With Difficult Personalities Act", which is the subject of this lawsuit. In that article, which the Court considers to be a parody, or a criticism of recent tort litigation in the field of employment, Mr. McDonald wrote in pertinent part:

In *Misek-Falkoff v. IBM Corp.*, 854 F.Supp. 215 (S.D.N.Y.1994), affirmed, 60 F.3d 811 (2d Cir.1995), the plaintiff was placed on permanent disability status after a series of emotional outbursts, fits of rage, and altercations with supervisors and coworkers. She sued, alleging that she was discriminated against on account of her mental disability, but her suit was rejected. The court assumed that

the plaintiff was disabled but went on to hold that she was nonetheless unqualified for her job, even though she may have been technically competent. The court observed that it is a requirement of any job that any employee--disabled or not--be able to get along with coworkers and supervisors, and that an employer certainly may require its employees not to cause or contribute to disruptions and hostility in the workplace.

As a result of this language and its appearance in the Employee Relations Law Journal as well as on the World Wide Web, Plaintiffs have sued McDonald (as well as the other Defendants) for Defamation, with alternate legal theories also pleaded.

In addition to writing the "Lex Mentis" column for the Employee Relations Law Journal, Mr. McDonald is also listed on its "Editorial Advisory Board." Although technically a Board member, Mr. McDonald avers that the Board never meets as an entity and, as far as he knows, the Board "had no separate existence as an entity and no responsibilities or authority of any kind [FN4]." McDonald Dec. at ¶ 7. Moreover, Mr. McDonald's sole activity as a Board member was to comment on proposed articles of other authors.

FN4. Similarly, in a Declaration submitted in support of Defendants' motion ("Shea Dec."), James O' Shea, the Associate Publisher of the Law & Business II publishing unit of Defendant Aspen, stated that the Board "has no structure or separate existence as an entity. Collectively and individually, it and its 'members' have no responsibility, power, or authority of any kind." Shea Dec at ¶ 6.

Discussion

A. *Subject Matter Jurisdiction*

Defendants argue that complete diversity as required by 28 U.S.C. § 1332 is absent because the citizenship of Defendant Aspen Publishers, Inc. for purposes of the statute, is New York. This is so, according to Defendants, because Aspen, incorporated in Delaware, has its principal place of business in New York. Defendants have submitted Declarations from Jane Butler, President and CEO of Aspen and James O'Shea, Associate Publisher of Aspen's Law & Business II publishing unit, both declaring that this is so. [FN5]

FN5. Paragraph 31 of the Amended Complaint alleges Aspen is a Delaware Corporation.

In response, Plaintiffs argue and this court concludes that on February 1, 2001, the date Plaintiffs commenced this action, Aspen's corporate headquarters was in Gaithersburg, Maryland. Aspen, which held itself out to the public as having its principal office in Maryland, moved its corporate headquarters to New York thereafter. This branch of the motion is denied.

B. *Personal Jurisdiction*

Defendants contend that this Court lacks personal jurisdiction over Defendants McDonald and Fisher & Phillips. In Plaintiffs' Amended Complaint, they allege:

Personal Jurisdiction over Defendants McDonald and Fisher & Phillips, L.L.P. is based on Defendants' transacting and contracting business in New York (C.P.L.R. § 302(a)(1)) by soliciting publications in New York with several publishing houses including Aspen through its Employee Relations Law Journal, of which Board, on

information and belief, Mr. McDonald has been or is currently a Member.

On information and belief, Defendants McDonald and Fisher & Phillips further profit from and participate in professional organizations located in New York, and Defendants McDonald and Fisher & Phillips maintain interactive Web Sites, for example inviting New York traffic and revenue through the Web Site: (www) laborlawyers.com and affiliate sites.

With respect to Defendant McDonald, the Declaration submitted by him on behalf of Defendants' motion to dismiss states that these allegations are simply false. In that Declaration McDonald affirms that: (i) he is a citizen and resident of the State of California, (ii) he is employed as a partner in the Irvine, California law office of Defendant Fisher & Phillips, (iii) he does not practice law in New York, (iv) he is not a member of the New York State bar, (v) apart from the article sued on, he does not write any columns or articles for New York publications, (vi) he does not belong to, participate in or profit from any professional New York organizations or associations; nor does he "solicit publications in New York with several publishing houses," and (vii) he is an author of a column entitled "Lex Mentis" that appears in the quarterly publication of Defendant Employee Relations Law Journal.

With respect to Defendant Fisher & Phillips, McDonald's Declaration states: (i) that he is a partner in Fisher & Phillips, which is headquartered in Atlanta, Georgia, (ii) the firm currently maintains offices in Fort Lauderdale and Orlando, Florida; Oakland, Irvine, and San Diego, California; Las Vegas, Nevada; Chicago, Illinois; and New Orleans, Louisiana; (iii) it has never had an office in New York, (iv) only two or three of the firm's more than 140 lawyers were admitted to practice in New York and none of those lawyers currently has an office for or is

otherwise engaged in the active practice of law there, and (v) although the firm maintains a non-interactive website at *www.laborlawyers.com,* nothing in that website is addressed solely or directly to New York.

Finally, Defendants also point out that in April 2000, this Court stated;

Before proceeding further in this case, Plaintiffs should consider whether personal jurisdiction may be obtained over Defendants in this Court, inasmuch as section 302(a)(2) of the New York CPLR, applicable in this court under Rule 4(e)(1) does not extend to "long arm" service of process on non-residents in an action for defamation.

This Court concludes that on the papers presented, Plaintiffs have failed to demonstrate that personal jurisdiction may be asserted over Mr. McDonald individually, or his law firm, either under § 301 or 302 of the New York CPLR, and for this reason the action must be dismissed as to them.

C. *Failure to State a Claim*

Although pleaded in a multiplicity of forms, the complaint is essentially one for defamation. Since the offending article in *Lex Mentis* is incorporated by reference in the complaint, the Court moves directly to the article itself (found as Exhibit C to the affirmation of Kenneth P. Norwick, filed September 6, 2001).

This article, entitled "The Americans with Difficult Personalities Act," is essentially a parody or a criticism of the federal courts and the current environment in employment litigation.

The author notes that some ten years ago a historical event occurred when the President signed the Americans

With Disabilities Act (ADA) with various representatives of the disability community in attendance, including those with sight disabilities and hearing disabilities, and persons in wheelchairs. It is said that "nowhere to be found at the ceremony, however, was there a disgruntled employee flipping off his boss and spewing profanity at his co-workers." The author then points out that "ten years later 'mental disabilities' account for the greatest number of claims brought under the statute, that while some involve recognized mental disorders 'a growing proportion of these claims' involve emotionally troubled employees who cannot handle ordinary job stresses or get along with bosses and co-workers."

The author points out that in the beginning of our experience with the statute, employees who were "rude, insubordinate or disruptive" were almost uniformly excluded from ADA coverage, and that the inability to get along with others was not a covered disability, or else that insubordinate or disruptive conduct made one unqualified for the position. Defendant then refers to "some recent cases" which he writes "have called these basic principles into question" and points out that some courts have held that insubordinate or disruptive conduct can be protected if it can be blamed on some mental disability.

The article then analyzes the problem of "mindless incrementalism" in the courts and criticizes the drafting of the statute and the "muddled" judicial thinking which has extended its reach in the past decade.

The article then turns to the issue of whether the courts should recognize interacting with others as a major life activity, consistently with statements in the EEOC compliance manual. After citing numerous other reported civil cases in the article, the author reaches the plaintiff, Dr. Misek-Falkoff, for the first time at page 6 of the article. We

quote the sub-point in the article, entitled, "My Disability Made Me Do It!"

Previously, the ADA's requirement that one be qualified for the job in question was used by courts to exclude rude, insubordinate or disruptive employees from coverage under the ADA.

For example, in *Mancini v. General Electric Co.*, 820 F.Supp. 141 (D.Vt.1993), the plaintiff had numerous conflicts with his bosses and was ultimately terminated for refusing a work assignment. The court rejected his disability claim, maintaining that "the ability to follow the orders of superiors is an essential function of any position." In other words, employees who are insubordinate are not otherwise qualified for the position.

In *Misek-Falkoff v. IBM Corp.*, 854 F.Supp. 215 (S.D.N.Y.1994), *aff'd* 60 F.3d 811 (2d Cir.1995) the Plaintiff was placed on permanent disability status after a series of emotional outbursts, fits of rage and altercations with supervisors and co-workers. She sued, alleging that she was discriminated against, but her suit was rejected. The court assumed that the Plaintiff was disabled, but it went on to hold that she was nonetheless unqualified for her job, even though she may have been technically competent. The court observed that it is a requirement of any job that an employee--disabled or not--be able to get along with co-workers and supervisors, and that an employer certainly may require its employees not to cause or contribute to disruptions and hostility in the workplace.

This is the sole reference to Plaintiff in the offending article. The quotation noted above is followed by a footnote reference to *Boldini v. Postmaster General,* 928 F.Supp. 125 (D.N.H.1995) in which a psychiatrically disabled plaintiff was found not otherwise qualified for her position because of her repeated defiance of her supervisors' directives and her numerous altercations with co-workers and customers.

In addition to pleading a claim for defamation, Plaintiffs assert separate "causes of action" for civil rights, invasion of privacy through unlawful appropriation of likeness, false-light publicity, interfering with prospective advantage, intentional and negligent infliction of emotional distress, as well as a claim for loss of consortium asserted by Plaintiff Adin D. Falkoff. All of these separate claims merge in the defamation and do not give rise to any relief from this Court based on separate legal theories.

Because the publication is privileged and not actionable, the complaint is dismissed for failure to state a claim as to defendant Aspen Publishers, Inc. As an alternative ground in addition to the jurisdictional issues discussed above, the Court concludes that it must be dismissed for the same reason as to the author, McDonald, and his law firm.

The Clerk shall file a final judgment.

APPENDIX D – Denial of Rehearing.

Circuit Court of Appeals

Second Circuit Court of Appeals Denial of Petition for Rehearing, November 10, 2003

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of November two thousand three.

Misek-Falkoff,

Appellant,

v Dkt No: 02-7091

McDonald,

Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Linda D. Misek-Falkoff and Adin Falkoff

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By:

_____

Arthur M. Heller,
Motions Staff Attorney

APPENDIX D - Judge Vincent L. Broderick, on the physical disability of Trigeminal Neuralgia.

MEMORANDUM ORDER

VINCENT L. BRODERICK, District Judge.

I

The complaint in this case alleges placement of plaintiff employee Linda D. Misek-Falkoff [FN1] on permanent disability status by International Business Machines Corporation ("IBM"), the defendant employer (the "employer") in violation of Section 504 of the Rehabilitation Act of 1973 (the "Act"), 29 U.S.C. § 794. Primarily involved is an issue of res judicata. Absent res judicata there are issues of whether plaintiff was "otherwise qualified" to retain her job [FN2] within the meaning of the Act and if so whether the defendant employer made "reasonable accommodation" in light of plaintiff's handicaps ...

Plaintiff suffered during her employment from a physical disorder related to the nervous system. Her condition caused her to be unable to work at unpredictable times. Her unavailability for work lasted for varying lengths of time, sometimes for days; she had substantial absences in connection with her physical disorder, and as the result of surgery in 1985 to alleviate the disorder. ...

Through at least the last seven years of her employment plaintiff suffered from sharp head pains and other symptoms associated with atypical trigeminal neuralgia, a disorder of the nervous system, [FN6] and she had attacks at unpredictable times. Plaintiff was in frequent communication with the employer's medical department, as were her own physicians, and plaintiff often worked "to tolerance" (that is, as much as possible) or for half-days.

Plaintiff sometimes worked at home but not on a regular basis.
[reference to confirming neurosurgeon].

APPENDIX – E – POPPER, FED

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APPENDIX E — Dr. George POPPER, supporting the action.

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George Popper, Ph.D.
New York State Licensed Psychologist
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REFERENCE
01 CIV 0816 in the UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK (CLB) (MBF).

Dr. LINDA D. MISEK-FALKOFF and ADIN D. FALKOFF, Plaintiffs, -against- James J. McDonald et aL, Defendants.

AFFIDAVIT

This is the sworn statement of Dr. George Popper in support of plaintiffs in the action against James J. McDonald

Jr. and others in Federal Action - 01 civ 0816. I make this statement with a reasonable degree of professional certainty based both on professional and personal knowledge.

I am a New York State (NYS) Licensed Psychologist, with over 25 years of clinical experience in which such instruments as the American Psychiatric Association Diagnostic and Statistical Manual (DSM), including DSM-IV, have an important and widely acknowledged role. Most governmental agencies and insurance carriers require the use of this Manual and virtually all Licensed or Certified mental health practitioners must be proficient in its use. As such, and as Defendant McDonald himself acknowledges, this Manual is the recognized authority on the diagnostic classification and categories of mental disorders. I am also a full member of The American Psychological Association and related organizations. Therefore, I am able with some expertise to evaluate Mr. McDonald's assertion that he supports and encourages the use of the DSM-IV for mental and psychiatric diagnostic purposes in conjunction with Americans With Disabilities Act Employment Law.

I can state unequivocally that author McDonald and his publishers are seriously misapplying these clinical materials here, and I am of the opinion that Mr. McDonald's inclusion of Dr. Misek-Falkoff and Mr. Falkoff in his discussion of the DSM-IV's use in employment law or, specifically, the ADA, (with which I am also familiar through my practice), to be wholly Inappropriate. This would be true even if Mr. McDonald was credentialed as a psychiatrist or psychologist.

I have read the Memorandum Opinion of Judge Broderlck in the former Rehabilitation Act case, The Complaint in this case, Mr. McDonald's article "The Americans with Difficult Personalities Act," and the Defendants' Motion to dismiss. It Is my view that Mr. McDonald's writings, simply said, do not match the aforementioned documentation.

I came to know Dr. Misek-Falkoff during the time she was afflicted with Trigeminal Neuralgia and I know of Dr. Misek-Falkoff's struggle for the right to telecommute. At that time, she often could not go to work because of extreme head and face pain and I had always considered her request for telecommuting valid. I am aware that as a computing professional she had in one form or another utilized and indeed pioneered telecommuting as a college professor and in the computing Industry when unfortunately her physical affliction prevented her from being physically present in the workplace.

I am also aware that Dr. Misek-Falkoff has a law degree, and to my personal knowledge she has always subscribed to the highest ethical standards in all her endeavors. It is difficult to read a document in which she is disparaged as she is in Mr. McDonald's article. One can only Imagine the very negative impression of her that this makes on readers of this article.

Dr. Misek-Falkoff's former federal suit was to seek accommodation for physical pain and I know how emotionally distressed she is to read Mr. McDonald's assertion that this was not the basis of her lawsuit. Dr. Misek-Falkoff's lawsuit had nothing to do with a psychiatric problem and to suggest otherwise is a gross inaccuracy.

Mr. McDonald has targeted Dr. Misek-Falkoff and Mr. Falkoff in other publications, each having its own content and tone and in different ways deeply denigrating as regards the plaintiffs here, I have supported them and continue to do so on a professional and ethical basis.

As the Federal Court in the Rehabilitation act suit made clear, Trigeminal Neuralgia is a physical condition. Surely the Defendants know the Court says this (and the DSM-IV makes this clear regarding General Medical Conditions, specifically not to be confused with personality disorders etc.). Mr. McDonald, it appears, deliberately chose to hide this fact about the Court Decision from his readers and audience. it is important to emphasize that Trigeminal

Neuralgia is a physical condition and not mental disease. This distinction Is clear and irrefutable as regards the present case.

Mr. McDonald has seriously misrepresented Dr. Misek-Falkoff as being a person with no real (physical) affliction, and has labeled her as having a "difficult personality" diagnosis (apparently his invention). He inaccurately describes her as one who applied for and was turned down for mental or psychiatric disability accommodations under the American with Disabilities Act (ADA) and one who supposedly was processed under ADA guidelines with their psychiatric standards.

The Defendants, in their motion iii which they are ostensibly reporting the Court's Decision, apparently added rather unfortunate terms including "bizarre, Irrational, and aberrant," and so far as I discern from a review of the papers, these terms do not occur in the case they claim to cite.

I agree with Plaintiffs in their Complaint that this publication is deeply denigrating and discriminatory toward both physical and mental health applicants for judicial relief under anti-discrimination law protection, and is specifically grievous toward Dr. Misek-Falkoff and Mr. Falkoff. Also, as a clinical psychologist who has worked extensively with developmentally disabled people, I find both the tone and title of Mr. McDonald's article particularly unpleasant.

It is my professional and personal opinion that Mr. McDonald's writings are harmful not only to Dr. Misek-Falkoff, but to all those individuals who justly seek protection under the ADA umbrella. I know that Dr. Misek-Falkoff and Mr. Falkoff are suffering intensely from the unfortunate publication and dissemination of this article and its falsehoods about them.

It is my view that the argument that Dr. Misek-Falkoff is "libel and injury-proof" is callous and cavalier in its tone and its intent. It seems to me that this remark is no more than a veiled attempt to evade responsibility for having authored this cruel and defamatory publication.

In conclusion, I believe that the Defendant's writings involving Dr. Misek-Falkoff and Mr. Falkoff should be withdrawn with appropriate retractions. If necessary, I am prepared to discuss these matters in court if asked to do so. I am aware also that a prominent neuropsychiatrist with considerable clinical experience with both physical and mental conditions has expressed an interest and a willingness to support this action In addition to myself, and perhaps other well-qualified colleagues, as well.

Dated: 10/20/2001
(signed)_____
George Popper, Ph.D.
NYS Licensed Psychologist

SWORN BEFORE

APPENDIX F— Legal sources: Trigeminal Neuralgia is Physical

(See the Record) that Trigeminal neuralgia is a physical disorder, just as judge Broderick wrote.

EXHIBITS

Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U.S. 250, 5 S.Ct. 119, 28 L.Ed. 708 (U.S.N.Y., Nov 17, 1884)

...heart, palpitation, aneurism, disease of the urinary organs, syphilis, rheumatism, gout, **neuralgia,** dropsy, scrofula, small-pox, yellow fever, and cancer or any tumor. ...

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (U.S.Conn., Jun 16, 1977) (NO. 75-871)

...heart . . . high blood pressure . . . **neuralgia** in my face, and sinus," id., at 106), and that...

Ewing v. Meting & Casselberry, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (U.S.Dist.Col., May 29, 1950) (NO. 568)

...caries, Irregular heartbeat, Colitis, Craving for sour foods, Arthritis (rheumatism), **Neuralgia,** Deafness, Subject to colds.' This version is the basis for...

Rafaniello v. Apfel, 60 Soc.Sec.Rep.Serv. 46 (E.D.N.Y., Feb 23, 1999) (NO. 98-CV-4354(JG))

... **trigeminal neuralgia.** [FN2] (Id.) Rafaniello also saw Dr. Anthony J. Sarro in August of 1992 regarding the pain he was experiencing in his face. (Tr. 93.) Dr. Sarro, like Dr. Marino, diagnosed Rafaniello as suffering from **trigeminal neuralgia.** (Id.) Dr. Sarro noted that Rafaniello was undergoing long-term therapy with the medication Tegretol, [FN3] and between August of 1992 and November of 1995, Rafaniello met with Dr. Sarro three times. (Id.) FN2. **Trigeminal neuralgia** refers to pain of the face affecting the region supplied by the **trigeminal** nerve. See 4 J.E. Schmidt, M.D ., Attorney's Dictionary of Medicine N-68 (defining **neuralgia);** 6 id. at T- 243 (defining **trigeminal neuralgia).** The **trigeminal**

Herring v. Hayes, 135 A.D.2d 684, 522 N.Y.S.2d 583 (N.Y.A.D. 2 Dept., Dec 21, 1987) (NO. 3413E)

... the natural progression of a disease called **trigeminal neuralgia.** The plaintiff repeatedly suffered its symptoms,

Hodge v. Coughlin, (S.D.N.Y., Sep 22, 1994) (NO. 92 CIV. 0622 (LAP))

... **trigeminal** nerve. Tr. at 99. The **trigeminal** nerve is one of the cranial nerves affecting the eye, face and forehead. Id. Some of the effects of herpes zoster ophthalmicus are deep inflammation and scarring of the skin, **neuralgia,** [

Misek-Falkoff v. International Business Machines Corp., 854 F.Supp. 215, 3 A.D. Cases 449, 5 A.D.D. 569, 5 NDLR P 154 (S.D.N.Y., May 13, 1994) (NO. 89 CIV 6269 (VLB))

... pains and other symptoms associated with atypical **trigeminal neuralgia,** a disorder of the nervous system, [FN6]

Misek-Falkoff v. McDonald, 177 F.Supp.2d 224 (S.D.N.Y., Nov 19, 2001) (NO. 01 CIV 0816 (CLB))

... part, on a "debilitating pain condition of **Trigeminal Neuralgia"**, which she developed in or about 1980

Seymour v. Roe, N.Y. Slip Op. 10570 (N.Y.A.D. 3 Dept., Jan 30, 2003) (NO. 92040)

... **neuralgia."** Defendant's only other proof in support of his motion was a February 2000 letter to Schroyer from the neurologist who treated her for cervical tenderness and headaches and concluded that she had "[c]ervicogenic and post-traumatic headache with [a]

Hoagland v. Kamp, 155 A.D.2d 148, 552 N.Y.S.2d 978 (N.Y.A.D. 3 Dept., Mar 22, 1990) (NO. 58882)

...improperly diagnosed and treated plaintiff Audrey Hoagland's **trigeminal neuralgia,** a painful nerve disorder commonly known as

Lichtman v. Heit, 2002 N.Y. Slip Op. 11101 (N.Y.A.D. 1 Dept., Dec 31, 2002) (NO. 1977)

... **neuralgia** paresthetica," denoting severe, stabbing or throbbing pain in the course or distribution of a nerve, involving numbness and tingling in the affected extremity (Stedman's Medical Dictionary 1206, 1316 [27th ed 2000]). This finding is consistent with that of the

U.S. v. Khmelnitsky, 89 A.F.T.R.2d 2002-1661 (S.D.N.Y., Mar 25, 2002) (NO. 01 CR.890 RWS)

... problems, ulcers, and a rare disorder named **trigeminal neuralgia** (intense facial pain that radiates throughout the

Callahan v. Forest, 118 N.Y.S. 541 (N.Y.Sup., Jan 1909)

... 1908, he was taken seriously ill with **neuralgia** of the heart, more technically known as

Meacham v. Knolls Atomic Power Laboratory, 185 F.Supp.2d 193 (N.D.N.Y., Feb 13, 2002) (NO. 97-CV-12 (DRH), 97-CV-45 (DRH))

... at 29- 30. Stannard also experienced **trigeminal neuralgia.** [FN27] These problems persisted in diminished

Morris v. New York, O. & W. Ry. Co., 6 Am.Negl.Cas. 35, 73 Hun 560, 56 N.Y.St.Rep. 231, 26 N.Y.S. 342 (N.Y.Sup.Gen.Term, Dec 01, 1893)

... not say the plaintiff's injury was intercostal **neuralgia,** and he said he did. No

H.A. Metz Laboratories v. Blackman, 153 Misc. 171, 275 N.Y.S. 407 (N.Y.Sup., Oct 08, 1934)

...for the treatment and alleviation of headache, **neuralgia,** colds, influenza, rheumatism, and other ailments, under

Edison v. Continental Chemical Co., 220 F. 398 (S.D.N.Y., Nov 30, 1914) (NO. 10-74)

...then thought would be useful as a **neuralgia** remedy. He made an application for

People ex rel. Young v. Sturgis, 85 A.D. 20, 82 N.Y.S. 953 (N.Y.A.D. 2 Dept., Jun 12, 1903)

...other. He also suffers from continued **neuralgia.**" On September 5th the relator was

Fane v. National Ass'n Railway Mail Clerks, 197 A.D. 145, 188 N.Y.S. 222 (N.Y.A.D. 4 Dept., May 11, 1921)

... A man named Pixley was suffering from **neuralgia.** He sent to the drug store

Fort v. Brown, 46 Barb. 366 (N.Y.Sup.Gen.Term, 1866)

... injury, I could readily believe that the **neuralgia** might have been caused by it; I

Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U.S. 250, 5 S.Ct. 119, 28 L.Ed. 708 (U.S.N.Y., Nov 17, 1884)

... of the urinary organs, syphilis, rheumatism, gout, **neuralgia,** dropsy, scrofula, small-pox, yellow fever, and

Munn v. City of Hudson, 61 A.D. 343, 70 N.Y.S. 525 (N.Y.A.D. 3 Dept., May 08, 1901)

... January, 1897, she began to suffer from **neuralgia** and pain in her head and ear,

APPENDIX G – Practicing Law Institutes adopts misreport of Federal First Amendment Case Law, post James McDOnald.

"An article in the "Lex Mentis" column of the Employee Relations Law Journal entitled "The Americans With Difficult Personalities Act," which summarized and mocked an Americans With Disabilities Act ("ADA") lawsuit brought by the plaintiff, was not actionable defamation. The article observed that, ten years after the enactment of the ADA, emotional difficulties accounted for the greatest number of ADA claims, and complained of how the "mindless incrementalism" and "muddled thinking" of the federal courts had led to the regime. The article then discussed plaintiffs' lawsuit, which resulted from plaintiff's former employer placing her on permanent disability after having a serious of emotional outbursts with her supervisor and coworkers. The court ruled that "this discussion of a reported decision ... is not so removed from the facts as to lose its First Amendment protection as a fair report of a public judicial proceeding." Although the court recognized that plaintiff viewed the article as unfair, plaintiff's remedy was "to write an article of her own." Misek-Falkoff v. McDonald, 177 F. Supp. 2d 224 (S.D.N.Y. 2001).

[Weis et. al, "Practising Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series PLI Order No. G0-00UG November 14-15, 2002 - New York City, Communications Law 2002: *435 RECENT DEVELOPMENTS IN DEFAMATION LAW 2002] [underlining supplied].

APPENDIX H — en banc materials.

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LINDA D. MISEK FALKOFF and ADIN FALKOFF,

Plaintiff, Appellants,

v.

JAMES J. McDONALD JR., ESQ., EMPLOYEE RELATIONS LAW JOURNAL EDITORIAL BOARD, EMPLOYEE RELATIONS LAW JOURNAL, FISHER AND PHILLIPS, L.L.P., AND ASPEN PUBLISHERS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*.

Linda. D. Misek-Falkoff, Ph.D., J.D., pro se.
Adin Falkoff, M.A., pro se.
79 Grandview Ave.
Pleasantville NY 10570
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SELECTED ABSTRACTS:

(A) Authority on the issue of the level and type of scrutiny applied to a disability case of a senior and female when the case is dismissed in pre-answer, pre-discovery stance from the movants' perspective, prima facie evidence of personal jurisdiction over one of several defendants (though found against others) is disregarded..

The term 'disability' means, **with respect to an individual** -- "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; "(B) a record of such an impairment; or "(C) being regarded as having such an impairment." 42 U.S.C. §

12102(2). [*Albertson's, Inc. v. Kirkingburg* 527 U.S. 555, *563, 119 S.Ct. 2162, **2167 (U.S.Or.,1999)]. [Emphasis Supplied].

For 12 years, the ADA has proven **that when people are treated with dignity and respect,** our entire nation benefits. And the best way to celebrate the progress the ADA has made is to continue and build on that progress. [President George W. Bush, New Freedom Initiative, Submitted to Congress February, 2001]. [Emphasis Supplied].

Accomodation plans stress individuals:

This self-guided tutorial includes fields covering: specific disabling conditions; major life activities; accommodations including classroom, facility, administrative, academic, social and testing adaptations; least restrictive environment; assessment source; and educational impact including motor, behavioral, visual, perceptual and auditory performance. What's more, fields allow you to make additional notes or add your own selections — **so you can craft the best plan for each individual student**. [Section 504/ADA Individual Accommodation Plan Writer Software 2.0] [Emphasis Supplied]

A motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is analyzed under the same standard applicable to a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *See Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.), *cert. denied,* 513 U.S. 816 (1994). Accordingly, judgment on the pleadings is appropriate only if, drawing all reasonable inferences in favor of the non-moving party, it is apparent from the pleadings that no material issues of fact need to be resolved and that the moving party is entitled to judgment as a matter of law. *See*

id.; [*Carballo ex rel. Cortes v. Apfel,* 34 F.Supp.2d 208, 214 (S.D.N.Y.1999)].

(B) Authority on the Issue of the level and type of scrutiny applied to decisions of what constitutes "substantial" truth and fairness under First Amendment line of cases of New York Civil Rights Law § 74 — and the equal protection of Fifth and Fourteenth amendments (Statutory Appendix) and how seriously and by what lights are to be taken fundamental inaccuracies and mischaracterizations and therefore whether privilege from suit is properly granted by the court without deliberation by a jury.

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published. **This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof. [New York Civil Rights § 74. Privileges in action for libel]** [Emphasis added].

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Plaintiff sues for damages for libel. Defendant pleads as a **defense** that the article complained of was **a fair and true report of a** judicial proceeding. This defense has been stricken out, because it contained an admission by the Defendant that the publication complained of was **to some extent inaccurate and erroneous**.

We think that under the present circumstances, including the **inaccuracy in reporting**, the question as to whether the report of Hill's testimony was substantially true and was a fair report, was for the jury. George v. Time, Incorporated, supra ... a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated.' As was said

concerning a defense of justification, in Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537, 538: **'A workable test is whether the libel as published would have a different effect on the mind *125 of the reader** from that which the pleaded truth would have produced. [*O'Connor v. Field* 266 A.D. 121, *125, 41 N.Y.S.2d 492, **494 (N.Y.A.D. 1 Dept. 1943) [Emphasis Supplied].

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New York law recognizes that an alleged libel is not actionable **if the published statement could have produced no worse an effect on the mind of a reader than the truth pertinent to the allegation**." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 302 (2d Cir.1986), *cert. den.* ---- U.S. ----, 107 S.Ct. 1303, 94 L.Ed.2d 158 (1987), *citing Fleckenstein v. Friedman,* 266 N.Y. 19, 23, 193 N.E. 537 (1934)...In general, quotation marks indicate a verbatim reproduction, and quotations add authority to a statement and credibility to an author's work**. A fabricated quotation may injure reputation by attributing an untrue factual assertion to the speaker, or by indicating a negative personal trait or an attitude the speaker does not hold**. ...

A purposely fabricated hence materially inaccurate quotation may constitute a libel of the persons purportedly being quoted in two ways: by attributing to the plaintiff a statement that he or she should not have made, or by placing in the plaintiff's mouth a false and defamatory statement about him - or herself. Ben-Oleil, see *Masson* v. New Yorker and Ben-Oliel v. press, citations omitted). The latter: "In order to constitute a libel, it is not necessary for the Defendant to directly attack the plaintiff as an ignorant imposter. The same result is accomplished by putting in her mouth or attaching to her words which make self-relation of such a fact (Ben-Oliel")...

A trier of fact in this case could find that the reasonable reader would understand the quotations attributed to *Masson* to be nearly verbatim reports of his statements.

[*Masson v. New Yorker* Magazine, Inc., 501 U.S. 496, .S.Ct. 2419 (1991]. [Emphasis Supplied].

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Here, for reasons previously noted, **the published news story was not a substantially accurate report of the charges or accusations made against plaintiff** (*see, Holy Spirit Assn. for Unification of World Christianity v. New York Times Co.,* 49 N.Y.2d 63, 67, 424 N.Y.S.2d 165, 399 N.E.2d 1185). **Defendants did not act "as the agent of the public, reporting only that which others could hear for themselves were they to attend the proceedings"** (*Hogan v. Herald Co.,* 84 A.D.2d 470, 477-478, 446 N.Y.S.2d 836, *affd.* 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002). Dibble v. WROC TV Channel 8 142 A.D.2d 966, *968, 530 N.Y.S.2d 388, **389 (N.Y.A.D. 4 Dept.,1988)]. [Emphasis Supplied].

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To qualify for the **fair report privilege**, an article or broadcast summarizing an official action or proceeding **must be accurate and complete** or a "fair abridgment" of the proceedings. It must be a summary of substantial accuracy, must capture the substance, the gist, the sting of the libelous charge, must be a "rough and ready" summary that [is] substantially correct... a report that is **accurate may not be edited and deleted in a way that renders its contents misleading"** [It] is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it." [Robert D. Sack, Sack on Defamation, Third Edition Volume 1a: Libel, Slander and Related Problems, Practicing Law Institute c. 1999]. [Emphasis Supplied]

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The test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published.... **If the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the**

official proceeding, then the privilege does not attach, as a matter of law." *Daniel Goldreyer, Ltd. v. Van de Wetering,* 217 A.D.2d 434, 630 N.Y.S.2d 18, 22 (1st Dep't 1995) (citations omitted). [*Procter & Gamble Co. v. Quality King Distributors, Inc.* 974 F.Supp. 190, *196 (E.D.N.Y.,1997)]. [Emphasis Supplied].

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True it is that **a publisher** "who in fact espouses or concurs in the charges made by others, or who deliberately **distorts** these statements to launch a personal attack of his own ... **cannot rely on a privilege of neutral reportage**." [*Edwards, v. National Audubon Soc., Inc,.* 556 F.2d 113 (1977)]. . [Emphasis Supplied].

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[4] The court also rejects Defendants' claim based upon Civil Rights Law § 74 since **Defendants' statement on the web sites that plaintiff was in a mental institution for much of his youth does not constitute a fair and accurate reporting of a judicial proceeding.** Moreover, Defendants' reliance upon recent newspaper articles to show that Pleasantville is a psychiatric facility is misplaced as defense counsel never sought to introduce these articles **at trial**. Further, defense counsel never sought to establish at trial, as he does now, that plaintiff has given contradictory statements about Pleasantville ... In this regard, plaintiffs have obtained a judgment finding that the statements published by Defendants on their web sites were libelous, establishing the merits of their claim (State of New York v. Fine, 72 N.Y.2d 967, 968-969, 534 N.Y.S.2d 357, 530 N.E.2d 1277.

[*Rombom v. Weberman*, Supreme Court, Kings County, New York.IAS Term, Part 14, Index No. 1378/00 (2002),]. [Emphasis Supplied].

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[Headlines are not privileged unless they are a fair index of the matter contained in a truthful report. Lawyers' Co-operative Pub. Co. v. West Pub. Co., 32 App. Div. 585,

590, 52 N. Y. S. 1120. **It is for the jury to say** whether *329 the publication fairly implies that defendant in the fraud action had been sued civilly and that she denied all the charges against her. Rovira v. Boget, 240 N. Y. 314, 148 N. E. 534. **The privilege thus extended must be kept strictly within proper bounds** (Sanford v. Bennett, supra), and not extended beyond the limits of the statute. The judgments should be reversed, and a **new trial granted**, with costs to abide the event. [*Campbell v. New York Evening Post* 245 N.Y. 320, *328, 157 N.E. 153, **156 (N.Y.1927 [Emphasis Supplied].

APPENDIX I — The Americans with Difficult Personalities Act." Spring, 2 000, "Employee Relations Journal," Aspen Publishers.

The Americans with Difficult Personalities Act

James J. McDonald, Jr.

In 1990, an historic event occurred on the lawn of the White House. President Bush signed the Americans with Disabilities Act (ADA) into law. In attendance were various representatives of the disability community, including persons with sight disabilities and hearing disabilities as well as persons in wheelchairs.[i] Nowhere to be found at the ceremony, however, was there a disgruntled[ii] employee flipping off his boss and spewing profanity at his coworkers.

Now, ten years later, mental disabilities account for the greatest number of claims brought under the ADA.[iii] While many of these claims involve well-recognized mental disorders such as bipolar disorder or major depression, a growing proportion of these claims involve emotionally troubled employees who cannot handle ordinary job stresses or get along with bosses and coworkers. In the early cases under the ADA, employees who were rude, insubordinate, or disruptive were almost uniformly excluded from ADA coverage. Courts held variously that the inability to get along with others was not a covered disability, or that insubordinate or disruptive workplace conduct made one unqualified for the job in question.[iv] It seemed fairly clear that the obnoxious employee, the insubordinate employee, and the employee who could not handle ordinary work stresses would not be able to cloak themselves in the protection of federal civil rights law.

Some recent cases, however, have called these basic principles into question. The law has now developed to the point that the inability to get along with others in itself may be sufficient to qualify one for ADA coverage, and insubordinate or disruptive

conduct may be protected if it can be blamed on some mental disability. How did we get to such an absurd place?[14]

Mindless Incrementalism at Work

"Mindless incrementalism" refers to the means by which a once noble concept becomes twisted and perverted through a series of small steps to reach an end that would be unthinkable were it to be pursued in one large leap. The ADA's noble concept is that disabled persons should have an equal shot at jobs that they are able to perform in spite of their disability. The drafters of the ADA and those in attendance in 1990 when it was signed into law would have laughed at the notion that the new law could be used by rude, disruptive, or insubordinate employees in an attempt to avoid the consequences of their own misconduct.

...

In the workplace, the manipulative, aggravating, abrasive, or insensitive personality style of the personality disordered employee can both disrupt the organization and be the catalyst for claims of harassment and discrimination.[v] If the Ninth Circuit's view takes hold, we can expect more and more of these troubled employees to expect accommodation rather than discipline or discharge. ..

"My Disability Made Me Do It!"

Previously, the ADA's requirement that one be qualified for the job in question was used by courts to exclude rude, insubordinate, or disruptive employees from coverage under the ADA.

For example, in Mancini v. General Electric Co., 820 F. Supp. 141 (D. Vt. 1993), the plaintiff had numerous conflicts with his bosses and was ultimately terminated for refusing a work assignment. The court rejected his disability claim, maintaining

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that "the ability to follow the orders of superiors is an essential function of any position. In other words, employees who are insubordinate are not otherwise qualified for the position." In Misek-Falkoff v. IBM Corp., 854 F. Supp. 215 (S.D.N.Y. 1994), affirmed, 60 F.3d 811 (2d Cir. 1995), the plaintiff was placed on permanent disability status after a series of emotional outbursts, fits of rage, and altercations with supervisors and coworkers. She sued, alleging that she was discriminated against on account of her mental disability, but her suit was rejected. The court assumed that the plaintiff was disabled but went on to hold that she was nonetheless unqualified for her job, even though she may have been technically competent: The court observed that it is a requirement of any job that an employee — disabled or not — be able to get along with coworkers and supervisors, and that an employer certainly may require its employees not to cause or contribute to disruptions and hostility in the workplace.[vi]

In Palmer v. Circuit Court of Cook County, 117 F.3d 351 (7th Cir. 1997), the plaintiff, who had been diagnosed as paranoid and delusional, was suspended after telling a coworker that she was going to "kick her ass."

...

The EEOC therefore appears to stand ready to protect the right of employees to act like jerks so long as they are non-violent jerks.

It will be interesting to see the EEOC's reaction when a manager with, say, a bad case of Narcissistic Personality Disorder (which is characterized by grandiosity and a marked lack of empathy for others) creates a hostile working environment by habitually addressing his subordinates in insulting gender terms such as "bitch" or worse, and then invokes the ADA when his employer attempts to discipline him ...

e fact that no violence is involved and that the EEOC takes a dim view of workplace courtesy requirements makes the seemingly obvious answer to this question somewhat less than certain, however. Watching the EEOC attempt to explain how insulting comments from subordinate to supervisor may be protected under the ADA but insulting comments from supervisor to subordinate would not be, would present an especially delicious irony. ...

In the meantime, the EEOC and the courts should avoid further trivializing the ADA by extending its coverage to those whose only real affliction is manifest in an obnoxious demeanor, a disregard for the feelings of others, or a lack of respect for authority. The ADA was designed to give a fair shake to those with genuine disabilities, not to provide problem employees with a means of disguising their misconduct as disease.

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[i] As *humorist P J. O'Rourke described the scene:*

There was an enormous ceremony on the South Lawn of the White House, where the president signed the Americans with Disabilities Act. Two thousand of the disabled and their families were invited to attend in the broiling summer heat. People in wheelchairs were yelling at the deaf to sit down and the blind were bumping the palsied with their dogs. In a crueler age some onlookers might have laughed, but we never laugh at misfortune today. In fact, we're all trying to get in on it.

P. J. O'Rourke, *Parliament of Whores* 72 (1991).

[ii] Query: Is the opposite of a 'disgruntled" employee a *gruntled* employee? Should we strive to achieve gruntled workforces?

[iii] In fiscal year 1998, mental and psychiatric impairments represented 16.4 percent of all ADA charges filed with the EEOC. The next-highest category was back problems, representing 12.8 percent of charges filed. Source: Equal Employment Opportunity Commission.

[iv] See J. McDonald & R. Broudy, 'Job Stress and the ADA," 23 *Empl. Rel. L.J.* 67 (1997).

[v] See J. McDonald & P. Lees-Haley, 'Personality Disorders in the Workplace: How They May Contribute to Claims of Employment Law Violations," 22 *Bmpl. Rel. L.J.* 57 (1996).

[vi] See also *Boldini v. Postmaster General,* 928 F.Supp. 125 (D.N.H. 1995)(although court found that the plaintiff was psychiatrically disabled, it determined that she was not otherwise qualified for her position because of her repeated defiance of her supervisors' directives and her numerous altercations with coworkers and customers).